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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. [redacted] 55

RUDDY BROOK CLOTHES, INC.,
Petitioner,

vs.

BRITISH AND FOREIGN MARINE INSURANCE CO., LTD., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS OF THE COURTS BELOW.

The opinion of the Trial Court appears at R. 25-28 and is reported at 103 F. Supp. 290. The opinion of the Court of Appeals for the Seventh Circuit appears at R. 44-49, and is reported at 195 F. 2d 86.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition (p. 2).

MATTER INVOLVED.

The Summary of Matter Involved found in the Petition (pp. 2-5), is subject to the following additions and corrections:

1. The matter involved is the alleged refusal, by

seventeen insurance companies, to underwrite the fire risks at 622-24 West Roosevelt Road, Chicago, Illinois, and at no other place. This refusal was operative after petitioner's 1947 fire, and at no other time. The refusal had the effect that petitioner reduced its inventory and its operation to the extent (R. 12) that petitioner from time to time desired not to assume its own fire risks on the portion of its inventory valued in excess of $95,000, its insurance protection (R. 10) and up to $150,000, the value of its inventory from time to time (R. 11). There is no allegation that it had any other effect.

2. The alleged refusal by defendant to sell fire insurance to plaintiff *resulted* (Complaint, par. 8, R. 6 and par. 12, R. 11) from the confidential report (R. 14-18), which stated that the origin of each of petitioner's two fires remained undetermined, after thorough investigation. It had no other motivation or impetus.

3. The Petition exaggerates the scope of the alleged restraint in two respects. First, the report dated May 6, 1947, was not circulated by respondent National Board of Fire Underwriters or its agents, "among *all* of its member companies," as the Petition asserts. (P. 2, Italics supplied.) The complaint alleged (par. 8, R. 7) that said report "was distributed to 'Companies Interested'," which were "the insurance companies with whom the plaintiff had been insured * * *." In fact, five members of respondent National Board of Fire Underwriters were underwriting petitioner's fire risks when the complaint was filed (R. 11), which refutes petitioner's implication that all members refused to deal with petitioner. Second, petitioner errs in reciting (p. 3) that its inability to obtain "adequate" fire insurance resulted from "the boycott *and black-listing* of the petitioner." (Italics supplied.) Petitioner's reference to "blacklisting" implies that petitioner was added to an existing list, but the complaint alleged (par. 8, R. 6) that the "combination and conspiracy" complained of "had its inception as a result of" petitioner's 1947 fire. It

did not charge a conspiracy to black-list poor arson risks, or any other group or class of persons, or to refuse insurance to any applicant, other than petitioner.

4. Petitioner's conclusions that "the respondent insurance companies, with whom petitioner had been insured, *agreed to* and did cancel" (pp. 2-3, italics supplied) petitioner's policies, that respondents' conduct "has had the effect of lessening competition in the sale of fire insurance," and that "petitioner has been deprived of the opportunity to deal in a free market" (p. 4) are not supported by the factual allegations of the complaint. The facts alleged are that a report was circulated to the respondent companies and that each of them thereafter refused to deal with plaintiff.

QUESTION PRESENTED.

Petitioner's formulation of the questions presented assumes that every boycott restrains trade unreasonably, and violates the Sherman Act unless it is justified. The court below held (R. 49) that defendants' conduct was too "impotent in relation to either commerce or competition," to violate the Sherman Act. Respondents submit that the question presented by the decision below is:

> Whether the court below erred in determining that defendants' alleged conduct did not restrain trade unreasonably?

ARGUMENT.

The complaint attempted to state a claim for threatened injury to petitioner by reason of an unreasonable restraint by respondents, of "trade or commerce among the several States" (Title 15 U. S. C., § 1).

It succeeded only in stating a plea to the Court to allay, by the extraordinary remedy of injunction, petitioner's doubts and fears that somewhat more than $95,000 worth

of its $150,000 inventory might some day be destroyed by fire. Petitioner's doubts and fears resulted from the refusal of seventeen fire insurance companies to assume the risk that petitioner itself did not wish to bear.

Petitioner failed to allege any facts to support the essential elements of a Sherman Act claim, that defendants have contracted, combined or conspired unreasonably to restrain competition in their own line of commerce or in some other appreciable segment of commerce. Claims under the Sherman Act, like claims under other statutes, must state the essential elements of a cause of action under the statute relied upon.

Petitioner contends, however, that by use of the incantation, "boycott," it has escaped the requirement that a plaintiff allege some unreasonable purposes or effects of respondents' conduct, upon commerce and upon competition in the market.

Petitioner relies upon two "reasons for allowance" of the writ sought. First, petitioner asserts that the decision of the Court of Appeals is "in conflict with the applicable decisions of this Court." Second, petitioner argues that the decision below adds new limits upon the right of private parties to sue under the Sherman Act.

I. There Is No Conflict Between the Decision Below and the Decisions of This Court Upon Which Petitioner Relies.

The Court of Appeals did not, as petitioner asserts, differentiate between individuals and classes as subjects of boycotts. It differentiated between, (a) boycotts which impose an unreasonable restraint upon competition in an appreciable segment of commerce, and, (b) respondents' conduct, which was "as impotent in its relation to either commerce or competition as a lighted match to the tem-

perature of all outdoors." In each case cited by petitioner, this Court found an unreasonable and substantial restraint of competition in a general market.

The rule to be drawn from them is not as petitioner suggests, "that a concerted refusal to deal is a restraint prohibited by the Sherman Act" (p. 11), but that "a suppression of competition in the market," *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 506 (1940)[1] by boycott methods is illegal. Every case cited by petitioner involved an unreasonable and potent effort to control the market for goods or services. The cases have in common the fact that in each case, the boycott was a means of forcing non-members of the combination to accede to the demands of the combination. The objectives of the combination were illegal, and the means used to achieve those objectives were merely incidental.

Six of the ten cases upon which petitioner relies were combinations among competitors to exclude rivals from competition in their line of commerce. Petitioner here did not allege that respondents combined to exclude him, or others, from the fire insurance business. Hence there is no conflict between the decision below and the decisions of this Court in *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600 (1914); *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U. S. 457 (1941); *Montague & Company* v. *Lowry*, 193 U. S. 38 (1904); *American Medical Association* v. *United States*, 317 U. S. 519 (1943); *Associated Press* v. *United States*, 326 U. S. 1 (1945) and *Binderup* v. *Pathe Exchange, Incorporated*, 263 U. S. 291 (1923).

The *Eastern States* case involved a conspiracy among

[1] This Court described four of the cases relied upon by petitioner as involving "a suppression of competition in the market" by boycott methods, in the *Apex Hosiery* case, at p. 506. See quotation at p. 10, *infra*.

retail lumber dealers "to keep the retail trade to themselves * * *." (234 U. S. at p. 608.) The *Fashion Originators'* case involved a combination to exclude "style pirates" from competition with style originators. The *Montague* case involved exclusion of competitors in the retail sale of tile, and price-fixing as well. Of the *Medical Association* case, this Court stated (317 U. S. at p. 529), "the conspiracy was aimed at restraining or destroying competition, or * * * restraint of the free availability of medical or hospital services in the market * * *." In the *Associated Press* case, this Court rejected a request to hold the by-laws requiring A.P. members not to deal with nonmembers illegal, "standing alone," and approved the District Court's decree which outlawed that requirement only pending A.P.'s obedience to the injunction against its restrictive membership requirements. (326 U. S. at p. 22.)

In the *Binderup* case, the plaintiff "was in the business of selecting and distributing [films] to a circuit" of at least twenty theatres. (263 U. S. at p. 302.) The conspiracy in *Binderup* "was organized for the purpose of enabling these distributors [the defendants] to control prices and dictate terms to their patrons in Nebraska and other States." (p. 303.) Binderup was an exhibitor in several theatres which he owned or leased, as well as a distributor. Some of the defendant distributors, from whom Binderup had refused to buy film, "made threats to put him out of business *by underbidding* and supplying the various theatres constituting his circuit * * *." (p. 303, italics supplied.) The Omaha Film Board of Trade prevented the threatened underbidding by placing Binderup upon a blacklist and conducting a boycott against him. (p. 303.) No comparable control of the general market, or use of a boycott to protect that control, is alleged in the instant complaint.

United States v. *First National Pictures, Incorporated,* 282 U. S. 44 (1930), and *Paramount Famous Lasky Corporation* v. *United States,* 282 U. S. 30 (1930), were companion cases, involving two different aspects of the same system of trade restraint by motion picture distributors.

In the *First National* case, the "definite point of attack" was the conspiracy "to restrict freedom of sales by [motion picture] Distributors and of purchases by Exhibitors." (282 U. S. at p. 53.) This conspiracy forced all new owners of theatres in the area, under threat of an organized boycott by distributors, "to assume and complete all existing contracts entered into by the prior owners" (282 U. S. at p. 50) (and thus for a time, at least, to follow the prior owner's policy as to run and clearance). The scheme was camouflaged to appear as a credit-rating plan, by requiring security deposits from new owners who failed to assume prior owners' contracts, and by using the name, "credit committee". The court found the spurious "credit committee" in the *First National* case to be unlawful because of its purpose and effect of controlling the market for films. (282 U. S. at p. 54.)[2]

Paramount Famous Lasky Corporation v. *United States,* 282 U. S. 30 (1930), dealt with the legality of the distributors' use of standard contracts binding all exhibitors to compulsory arbitration agreements. The opinion emphasized the defendants' over all control and regulation of the industry as the essential element involved in the violation. (pp. 42-44.)

[2] By contrast, the alleged boycott in the instant case was based upon a *bona fide* investigation of petitioner's two unexplained fires. It was allegedly pointed at petitioner only. It was not directed to the market for insurance, nor did it involve expulsion or other penalties against non-cooperating fire insurance companies. Five members of respondent National Board of Fire Underwriters actually provided $21,500 in insurance to petitioner at the time this suit was filed. (R. 10, 11.)

In *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553 (1936), the Court was chiefly concerned with the arrangements in the industry which tended to fix prices and otherwise restrain trade in the market, and classed the refusal to deal with persons carrying on both a brokerage and a warehouse business as a "supplementary" restriction (p. 586), one of several "offspring of the basic agreement." (p. 601.)

Anderson v. *Shipowners Association*, 272 U. S. 359 (1926), was a combination to regulate the employment of merchant seamen on the Pacific Coast. The defendants, shipowners and operators, had restrained "their freedom to carry on interstate and foreign commerce according to their own choice and discretion * * *." (272 U. S. at p. 365.)

Petitioner's reliance upon *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951), illustrates the fallacy of petitioner's reasoning. Indisputably, the *Kiefer-Stewart* case is a price-fixing case, and the refusal to deal was a method and not an object of the combination, but petitioner reads it as if the tactic of refusal to deal was the heart of the violation.

Thus, petitioner would have the Court read all of its previous Sherman Act decisions to ascertain what means were used by the combinations condemned, and declare that any means so used is illegal, regardless of whether the object or effect of the combination was to restrain trade unreasonably.

This Court has consistently looked, not to the methods of reaching agreement or the methods of enforcing compliance with agreements reached, but to their content; their purposes and effects. Where the objective is to substitute private regulation and domination of commerce for Congressional authority, any means, whether innocuous or vicious, are condemned as parts of a broader plan.

In the instant case, *there is no broader plan*, and the Sherman Act therefore has no application. The decision of the Court below is in harmony with the previous decisions of this Court.

II. The Decision Below Did Not Add New Limits to the Sherman Act.

Petitioner's second reason for granting certiorari is that the decision below limits the rights of private parties to sue under the Sherman Act by permitting *de minimis* to be interjected as a defense. Petitioner states, "The economic welfare of one individual, we submit, is not a 'trifle' and beneath the dignity of a court." The court below did not say that it was. It stated that "The effect upon competition, like that upon the flow of commerce, was *'de minimis'*, it could have had no 'appreciable' effect upon either. * * * any restraint which * * * [respondents] imposed upon either the flow of commerce or competition is so trifling that it cannot be categorized as unreasonable." The court was thus stating in other words the proposition that the Sherman Act does not provide a remedy for every tort or every injury which several parties inflict upon another; its office is to protect the free market against unreasonable restraint.

The commerce involved herein is only the business of selling fire insurance to protect the premises at 622-624 West Roosevelt Road, Chicago, Illinois, against risk of loss by fire. Nothing whatsoever was alleged in the complaint which might indicate that the clothing business, in which petitioner is engaged, the fire insurance business, or any other business or profession would be substantially affected by an incompletely underwritten fire loss in petitioner's building. No facts were stated which indicated that any appreciable segment of commerce in the United States had been or might in the future be

affected by the concerted refusal of defendants to assume the risks which petitioner is desirous of transferring to them.

Petitioner seeks to distort beyond recognition the holding of *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947), that unreasonable restraint of an appreciable market for interstate goods violates Section 1. The Court below accepted the *Yellow Cab* case as its guide, and held that such a slight disadvantage to an entity so small as petitioner's business was not an unreasonable restraint of an appreciable part of interstate commerce. Petitioner would have this Court reverse this finding by the Court of Appeals, on the precedent of *Loewe* v. *Lawlor*, 208 U. S. 274 (1908); *Duplex Printing Press Company* v. *Deering*, 254 U. S. 443 (1921); and *Bedford Cut Stone Company* v. *Journeymen Stone Cutters Association*, 274 U. S. 37 (1927). *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940), at pages 505-506, pointed out that the *Loewe*, *Duplex* and *Bedford* cases all involved activities:

> "carried on on a country-wide scale by a national labor organization, in order to induce the purchasers of a manufactured product shipped in interstate commerce to withdraw their patronage from the producer.
>
> "* * * the activities affecting interstate commerce were directed at control of the market and were so widespread as substantially to affect it. There was thus a suppression of competition in the market by methods which were deemed analogous to those found to be violations in the non-labor cases. See *Montague & Co.* v. *Lowry*, 193 U. S. 38, 45, 46; *Retail Lumber Dealers Co.* v. *United States, supra; Paramount Famous Lasky Co.* v. *United States*, 282 U. S. 30; *United States* v. *First National Pictures*, 282 U. S. 44."

It is thus plain that the *Loewe*, *Duplex* and *Bedford* cases, contrary to petitioner's understanding of them, were concerned with significant nationwide conspiracies which unreasonably restrained interstate trade and commerce.

III. Conclusion.

Respondents submit that the petition herein is without merit and should be denied.

Respectfully submitted,

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